SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1014

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY TO NEW MATTERS RAISED IN THE BRIEF IN OPPOSITION

The issue in this case is clearly and simply whether the Insurance Company of North America may avoid the requirement of complete diversity of citizenship by avoiding the requirements of Rule 17(a), Federal Rules of Civil Procedure, and by invoking the provisions of Rule 19, Federal Rules of Civil Procedure.

This action was instituted by the Insurance Company of North America (hereinafter INA), in the name of Virginia Electric and Power Company (hereinafter Vepco), for the use and benefit of INA. In its answer to the com-

plaint herein, Westinghouse denied the existence of federal jurisdiction. Moreover, Westinghouse asserted, as its Tenth Defense, that INA was the real party in interest to the extent of its payment to Vepco and that INA must prosecute its claim in its own name or have the amount of its claim dismissed from this action. Even though INA was notified of this jurisdictional defect, it made no attempt to file its claim in a proper forum, and indeed, at a hearing conducted in the trial court on July 24, 1972, INA conceded that it was willing to run the risk of a lack of jurisdiction in hopes of keeping the case in the federal court.

The transcript of the hearing on July 24, 1972, Record Volume III, at pages 12 and 14 shows the following colloquy:

* * *

> Mr. Laughlin: A short time ago, a relatively short time ago, I think it was a matter of months or weeks, but during that stay period I personally was advised for the first time, and I think it appears in a pleading that was filed, that the citizenship of the Insurance Company of North America, and that of Westinghouse, was in fact the same.
>
> * * *
>
> That being true, we have a non-diverse case and the case should be taken off the docket.
>
> The Court: All right, sir. Thank you. Mr. Marks, do you wish to reply briefly?
>
> Mr. Marks: Yes, sir, I do, with the assistance of Mr. Orgain.

The Court: If Mr. Laughlin's position is correct then there simply isn't any jurisdiction. Do you want to run that risk?

Mr. Marks: Yes, sir, I do.

* * *

INA's decision to accept this risk, and both decisions below, appear to have their genesis in the conception of the effect of Rule 17 enunciated by Professor Charles A. Wright. That conception is best reflected in Professor Wright's statement that in the case of partial subrogation "[a]s in the case of partial assignment, the action will not be dismissed if the missing person cannot be joined because its presence would destroy diversity if his claim fails to meet the jurisdictional amount unless it is determined under Rule 19 that he should be regarded as indispensable." Wright & Miller, Federal Practice and Procedure: Civil § 1546 at 661.

This statement of the law is only partially true and cannot be relied upon to support the decisions of the lower courts. An examination of the authorities cited by Professor Wright in support of that statement clearly demonstrates why.

The first authority cited in support of the statement is this Court's decision in *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). An examination of *Aetna* is set forth in Westinghouse's Petition for Writ of Certiorari and will not be repeated here. Professor Wright also cites *Standard Accident Ins. Co.* v. *Lohman*, 295 F.2d 261 (7th Cir. 1961) in support of this statement.

However, *Lohman* holds that in cases of partial subrogation both the insured and the insurer are real parties in interest. Finding that both were real parties in interest, the Court then held that both the insured and the insurer should

be joined on the same side as plaintiffs or defendants and that "proper alignment of parties on such joinder would destroy the necessary diversity and require dismissal of the action." *Id.* at 264.

In *Lohman,* the insurer, Standard Accident Insurance Company, filed suit against Lohman, a sheriff, seeking damages for the alleged false and fraudulent return of a summons served on Standard's insurer, Groth, in a personal injury suit. A default judgment in the amount of $18,500 had been entered against Groth in the personal injury action. Groth sued Standard and ultimately received judgment against Standard for $17,500. Standard then sued Lohman to recover $17,500 plus attorneys' fees and expenses on the theory that Lohman had executed a false return of service on Groth in the personal injury suit. The appeal involved two issues, one of which was:

> "Whether, if plaintiff's [Standard] rights are merely those of a partial subrogee, it may maintain its action against defendants without joining Groth [the insured], and, if not, would such joinder destroy diversity jurisdiction?" *Id.* at 263.

The court, finding that the insurer had not paid the insured the full amount of the judgment or his attorneys' fees and expenses, held that if Standard was to assert any rights as its insured's subrogee, the insured must be joined as an indispensable party and that if this was done diversity would be destroyed because both the insured and Lohman were citizens of Illinois. The court held that this would require dismissal of the action for lack of complete diversity.

Finally, Professor Wright cites *Northern Assurance Co.* v. *Associated Independent Dealers,* 313 F.Supp. 816 (D. Minn. 1970) in support of his statement that an action

should not be dismissed if joinder under Rule 17(a) would destroy complete diversity. However, *Northern Assurance* held precisely what Westinghouse contends must be the result in this case.

In *Northern Assurance*, the insured's building was destroyed by fire and the insurer paid the insured the policy limit of $150,000 on a $300,000 loss. The payment was made in consideration of a loan receipt executed by the insured wherein the loan was repayable only in the event of, and to the extent of, a recovery by the insured against the allegedly negligent third-party tortfeasor. After the execution of this agreement, the insurer filed an action against the third-party tortfeasor in which the insurer was the only plaintiff. The defendant filed a motion for judgment on the pleadings asserting that the real party in interest was the insured because under the terms of the loan receipt, the insurer was not subrogated to the insured's claim and that accordingly since the insured was the real party in interest and was, as a Minnesota corporation, nondiverse to the defendant there was no diversity of citizenship.

The court held that under the facts presented to it, the insured was, indeed, the real party in interest and stated:

> "Rule 17(a) of the Federal Rules of Civil Procedure requires that 'every action shall be prosecuted in the name of the real party in interest * * * .' The same rule then allows the joinder of the real party in interest so as not to defeat the action. However, to allow the joinder in this case of . . . the real party in interest under the 'loan receipt' clearly would remove the present action from the jurisdiction of this court since the insured is a Minnesota corporation as is the defendant. Joinder of the insured would remove the complete diversity of citizenship required to maintain an action in federal court, under 28 U.S.C. § 1322." *Id.* at 818.

The Court further stated:

> "After defendant's motion was served and filed, however, plaintiff—evidently viewing defendant's motion with some concern from plaintiff's standpoint—executed a subrogation agreement with the insured to replace the earlier executed loan receipt. Plaintiff has asked the court to allow an amendment of its complaint to reflect this new situation which it contends and perhaps quite arguably would give or originally would have given the court jurisdiction since the present plaintiff would then be the real party in interest and thus there would be the requisite diversity of citizenship between parties. *If the amendment were to be allowed, recovery would of necessity be limited as a subrogation claim to the amount plaintiff actually paid, i.e.,* $150,000 *and no recovery in excess thereof could be had in this court for the Minnesota resident insured* who however apparently has a claim pending in State court for its loss in excess of the amount of insurance proceeds collected." *Id.* at 818. (Emphasis added.)

While *Northern Assurance* and *Lohman* are the converse of the fact situation in this case, both decisions correctly hold that if joinder of the partial subrogee/subrogor would result in a lack of complete diversity, the action must be dismissed. And *Northern Assurance* further holds that, if the action continues, any recovery would necessarily be limited to the amount owing to the party properly before the court, *i.e.,* the diverse party. Thus, *Northern Assurance* holds that the claim of the nondiverse party cannot be pursued in a federal forum. The obvious reason is that if the nondiverse party is permitted to pursue its claim in a federal court, the concept of complete diversity is rendered meaningless.

Westinghouse contends that INA, which is nondiverse to Westinghouse, cannot pursue its claim in this litigation.

INA's response to the Petition for Writ of Certiorari herein advances two reasons why the Petition should be denied.

First, INA contends that Rule 17 does not mean what it states, *i.e.*, that a claim must be pursued in the name of the real party in interest. It asserts that if the application of Rule 17(a) will defeat diversity jurisdiction, jurisdiction can be created by resort to the provisions of Rule 19. If INA were correct in insisting that its claim for the amount it paid Vepco *must* be litigated in the same action as any claim by Vepco for the uninsured portion of the loss, then, under Rule 19, INA is an indispensable party. *Travelers Indem. Co.* v. *Westinghouse Elec. Corp.*, 429 F.2d 77 (5th Cir. 1970); *Standard Accident Ins. Co.* v. *Lohman*, 295 F.2d 261 (7th Cir. 1961). But there is no requirement or basis upon which INA's nondiverse claim can or should be litigated in a federal forum. Thus, while a proper application of Rule 19 permits Vepco's claim to continue in the absence of INA, it clearly does not permit INA's claim to be pursued in its absence. The issue concerning the continuation of INA's claim must be resolved by Rule 17(a) and since INA admits, and both courts below have properly held, that INA is the real party in interest to the extent of its payment to Vepco, Rule 17(a) requires either that INA join the action or that, if INA fails to join, INA's claim must be dismissed.

Under the authorities cited herein and in the Petition for Writ of Certiorari, this situation cannot be changed simply because INA, being nondiverse to Westinghouse, cannot join the suit. However, to avoid this result, INA has taken on Vepco's robes and insists that Rule 19 operates to save its claim because Rule 19 operates to save Vepco's claim. It is clear, however, that Rule 19 cannot save INA's claim (1) because that rule was never intended to have such a result, and (2) because to do so negates the clear require-

ment of Rule 17 and avoids the requirement of complete diversity of citizenship.

Moreover, nothing in INA's response to the Petition for Writ of Certiorari and nothing in the decisions below can obscure the fact that INA ran the conscious risk that the application of Rule 19 would save it from complying with the requirements of Rule 17 and the requirements for complete diversity of citizenship. INA has stated no rejoinder to the specific cases cited by Westinghouse in support of its position. Rather, it seeks to distinguish these cases because they did not specifically involve the issue of diversity jurisdiction.

However, the application of Rule 17 is not dependent upon the existence or nonexistence of diversity of citizenship. It is a requirement that before any suit may be pursued in the federal court the claim therein asserted must be pursued in the name of, and by, the real party in interest. If the real party in interest is nondiverse to one of the defendants, the application of Rule 17 simply means that the nondiverse party may not bring its claim in the federal court.

INA asserts that Westinghouse asks this Court to permit multiple lawsuits, *i.e.*, one by Vepco in the federal court and one by INA in a proper forum. Westinghouse seeks no such result because the reality of this case is that Vepco has demonstrated no interest in pursuing Westinghouse. This case was filed by INA, it has been pursued at INA's expense by counsel employed by and representing INA. Just as INA is willing to run the risk that there is no diversity jurisdiction in this case, Westinghouse is willing to run the risk that Vepco will not pursue any claim against it.

INA and the Court of Appeals seem to express concern about the policy decision which will result from the

application of Rule 17(a). Both seem to be concerned about multiplicity of suits. However, both ignore the results of the failure to apply Rule 17(a). Failure to apply the rule clearly results in the creation of a new concept of diversity jurisdiction wherein any case of partial subrogation may be pursued in a federal court without regard to the citizenship of the real parties in interest in the litigation.

Moreover, the result of the decision below is to give the partially subrogated insurer, who has the primary, if not the exclusive, interest in the litigation, an election as to citizenship. For example, if the insurer desires to avoid litigation in the federal courts, it can simply discard the trappings of its insured's citizenship, assert that it is the real party in interest, and defeat diversity of citizenship. Conversely, if the insurer desires to create federal jurisdiction it can simply assume the citizenship of its insured and pursue an otherwise nondiverse claim in a federal forum. The decision below permits the insurer to determine the presence or absence of diversity of citizenship by giving the insurer a choice as to its citizenship, a choice which is not available to any other litigant.

However, Rule 17(a) clearly prohibits such a result. The proper application of Rule 17(a) precludes the determination of the proper forum by resort to the identity which the insurer chooses to assume for any given case because Rule 17(a) assures that the citizenship of the insurer remains constant and assures that diversity of citizenship is determined without regard to the fictional style placed on the pleadings by the insurer.

Secondly, INA contends that it has ratified the action "filed by Vepco" and that, having done so, the objection to the absence of complete diversity is not meritorious. However, Rule 17(a) specifically provides that ratification *"shall have the same effect as if the action had been commenced*

in the name of the real party in interest." In this case, ratification by INA is the same as if the action had been instituted in INA's name in the first place, and the institution of the action by INA, a Pennsylvania corporation, against Westinghouse, also a Pennsylvania corporation, constitutes a lack of complete diversity of citizenship and the resultant lack of jurisdiction in the federal court.

Accordingly, INA's reliance upon the doctrine of ratification is the unveiling of the frailty of its theory. For in the final analysis, INA's assertion of the ratification argument is a tacit concession that there is no jurisdiction in the federal courts.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Westinghouse respectfully requests that the Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. Sanderlin, one of the attorneys for Westinghouse Electric Corporation, a petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 8th day of February, 1974, I served copies of the Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the foregoing action on the several parties thereto, as follows:

(1) On the Insurance Company of North America, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth & Main Streets, Richmond, Virginia 23219.

(2) On Stone & Webster Engineering Corporation, by mailing three copies of the same in a duly addressed envelope, with postage prepaid to Charles W. Laughlin, Esq., Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219.

(3) On the Virginia Electric and Power Company, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth and Main Streets, Richmond, Virginia 23219, and by mailing three informational copies of the same in a duly

addressed envelope, with postage prepaid, to James E. Farnham, Esq., Hunton, Williams, Gay & Gibson, Post Office Box 1535, Richmond, Virginia 23212.

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